EQUITY CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH-CAROLINA.

DECEMBER TERM, 1837.

David J. White & Ann J. Colvin
v.
William H. Beatie, Ex'r of Ann J. White,
} From New-Hanover.

A bequest of a negro of a particular description, with a direction to the executor to purchase one, rather than divide families, is a pecuniary legacy.

Although specific legacies do not abate in favor of those which are pecuniary, yet where the testatrix bequeathed all her property specifically—and directed two negroes to be purchased for A and B, it was held, upon a deficiency of assets, that all the legacies must abate rateably.

The Plaintiffs in their bill set forth the will of the Defendant's testatrix, of which the following is a copy:

"When I am dead, I wish my brother W. H. B. to have my man *Will*, to do as he pleases with him, during his natural life. After that, I wish him to go to my brother H. G. W. to do as he pleases with forever. To the children of W. H. B. I leave little *Flora* and her children, to be equally divided among them. To H. W. B. G. I give and her child, to do as he pleases with. To A. I. W. daughter of H. G. W. big *Flora* and her whole family that I own, I leave to her. To T. J. and J. P. one hundred dollars to each. To *David J. White*, a likely negro boy, between eight and ten years old. To *Ann J. Colvin*, a likely negro girl, between four and five years old. The grave

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yard walled in, a tomb-stone put over my mother and self, &c. &c. To R. W. my clothes. To A. J. W my books. To M. A. B. the furniture of my room, say bed, drawers, &c. Pay all my just debts. I would rather you would buy negroes for *David J White* and *Ann J. Colvin*, than to separate families. I wish all this done at once, so as to save their being scattered."

The Plaintiff insisted that the legacies left them were specific, and in case of a deficiency of assets, ought not to abate in proportion to the others. And that if they were not specific, that there were assets sufficient to satisfy them. The prayer of the bill was for an account, and payment of the legacies.

The Defendant insisted, that the legacies to the Plaintiffs were general; that all the property of his testatrix was specifically bequeathed, and that there were no slaves of the kind bequeathed to the Plaintiffs. Denied assets, and rendered an account, from which, after exhausting the assets, not specifically bequeathed, a balance appeared due the estate.

The cause was heard upon bill and answer. No Counsel appeared for either party in this Court.

TAYLOR, Chief-Justice.—The two questions presented for decision by this record, are not of very easy solution, and the labour and difficulty have been increased by the want of Counsel to argue them, and the absence of all reference to authorities.

The first question is, whether the bequest to *D J. White*, of a likely negro boy, between eight and ten years old; and the bequest to *A. J. Colvin*, of a likely girl between four and five years, be specific or general legacies; for it is too clear to require a moment's examination, that the legacies of slaves to the other legatees are all specific.

The other question is, whether, if they should prove to be general legacies, the specific legatees are liable to abate *pro rata*, for the purpose of making them good,

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in the case which has occurred of a deficiency of assets to purchase them.

On the first question, the familiar definition of a specific legacy, in which all the writers concur, is, that it is the bequest of a particular thing, distinguished from all other things of the same kind—as of any chattel that would vest immediately upon the assent of the executor. Hence, money may be a specific legacy, if properly described, as a sum of money deposited in a chest or bag, or in the hands of a particular person. But if a sum of money is bequeathed, to be laid out in the purchase of lands, or to be vested in particular securities, it is a mere pecuniary legacy; for the legatee cannot, in that case, sever that from the general fund, so as to establish a right to the identical sum in specie. And this he must be able to do, in order to make his legacy specific. Thus, in a bequest of stock, if the testator owned it at the time, it is specific; more especially, if it can be collected from the will, that the testator intended to confine the bequest to the stock he had on hand at the time of his death. As if the legacy be of *my* stock, or part of *my* stock, or in *my* stock. (*Ashburner* v. *McGuire*. 2 *Brown's C. C.* 112.) But if a testator did not *own* the stock when he made his will, or died, but directed it to be purchased out of his personal estate for particular persons; on the question whether these legacies were specific or pecuniary, it was held by the Court, that they were pecuniary. *Gibbons* v. *Hall*—1 *Dicken's Rep.* 324). If, in the case before us, there had been negroes belonging to the estate, of the ages described in the will beyond those allotted to the specific legatees, which the executor might have delivered over to the Plaintiffs, without separating families, they would have been, without doubt, specific, although not particular chattels, specifically described and distinguished from all other things of the same kind; but comprehended

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These authorities, and the reasoning extracted from them, lead me to the conclusion, that the legacies to the Plaintiffs, are general and pecuniary; and here begins the real difficulty of this case, for it is a claim on the part of pecuniary legatees, to make specific legatees abate, upon a deficiency to pay the first mentioned legacies; whereas the commonly received opinion is, that the advantage specific legatees have over pecuniary ones is, that they are not compellable to abate, upon a deficiency of assets to pay general legacies. This is the general rule (2 *Vesey* 56.) And upon first reading the case, it appeared to me that the law was decidedly against the Plaintiffs. But upon a more attentive consideration of the will, and the situation of the estate, and upon an anxious search of the authorities, I think the Plaintiffs are entitled to what they ask.

It was the manifest intention of the testatrix, that all the legatees should have their legacies, if the estate was sufficient—they were all equally objects of her bounty; and if the specified legatees receive their respective shares in full, that intent, and that bounty, will be frustrated. And what seems a conclusive proof of this, is, that she had bequeathed all her negroes to the specific legatees, so that from what she had them bequeathed, the two slaves intended for the petitioners, must have been deducted, if it could have been done without separating families; for so I understand the direction to her executors. Circumstances might be such at her death, tha' two negroes of the description bequeathed to the petitioners, might be unconnected with family ties, by the death of their parents or others; and in the occurrence of this

state of things, they were to be allotted to the petitioners, from the negroes bequeathed. But if that should not happen, they were to be purchased from the residuum of her estate.

It does not appear, that the testatrix owned any thing but what she disposed of by her will. There is no proof that she was entitled to any real estate, nor that she had any reason to believe, that there would be a residuum of the personal estate, after the payment of debts and legacies. On the contrary, the accounts exhibited by the executor shew, that he was, until a very late period, and even after the account was stated, in advance to the estate, to the amount of several hundred dollars. Unexpected circumstances have replaced his advances, except to an inconsiderable amount; but he is still a creditor.

These views of the subject impress it forcibly on my mind, that it is essentially just and equitable, and in furtherance of the undoubted intention of the testatrix, that the petitioners should receive their legacies, or at least a rateable proportion of them with the other legatees. But this belief would not, for a moment, incline me to violate or disregard any rule of law, to effect objects, however desirable. It could not be expected, that much authority could be brought to bear on a case, marked with such special circumstances; but I have found one, which appears to be entirely and fully applicable to this case, the correctness of which has since been frequently recognized by writers of established reputation, and the illustration it affords, adopted and applied to the establishment of that exception to the general rule, by which alone these petitioners could have relief. "But if a man devises specific and pecuniary legacies, and afterwards says that such pecuniary legacies shall come out of all his personal estate, or words tantamount; *or, if there is no other personal estate than the specific legacies,* they must be intended to be subject to the pecuniary legacies, otherwise

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he must mock the legatees." (*Sayer* v. *Sayer*,—*Prec. Chan.* 393.)

A very accurate writer on the law of legacies, cites the case thus: "A case may happen, in which specific "legatees will be obliged to share, in favor of pecuniary "legatees. Suppose then, a person possessing a perso- "nal estate at B and C only, bequeath it specifically to "D and E, and then gives a legacy to F, generally; "the personal estate at B and C will be liable to the "payment of this legacy, as there never was any other "fund, out of which F's legacy could have been satis- "fied." (1 *Roper on legacies*, 418.) The same case is cited by *Ballow*, in his Treaties on Equity, edited by *Fonblanque*, 2 *vol.* 377, and by *Toller on Executors*, 226 and is nowhere, that I have discovered, doubted or denied.

There never was, in the case before us, any other fund, out of which the general legacies could be satisfied, except the specific bequests; and therefore, I think it applies strictly to this case. My opinion is in favor of the Petitioners; and an account should be taken of the respective values of the specific and general legacies, and an account of the assets.

PER CURIAM.—Let the Master ascertain the value of the specific legacies—and of those to the Plaintiffs—and let him take an account of the assets not bequeathed.

☞ Upon the distinction between pecuniary and specific Legacies, see the following cases: *Bishop of Peterborough* v. *Mortlock*, 1 *Bro. C. C.* 565.—*Simons* v. *Vallance*, 4 *do.* 345—*Coleman* v. *Coleman*, 2 *Ves. jun.* 639.—*Roberts* v. *Powock*, 4 *Ves.* 150.—*Kirby* v. *Potter*, *do.* 748.—*Raymond* v. *Brodbelt*, 5 *Ves.* 199—*How* v. *Earl of Dartmouth*, 7 *Ves.* 137.—*Sibley* v. *Perry*, *do.* 522.—*Webster* v. *Hale*, 8 *Ves.* 410.—*Deane* v. *Test*, 9 *Ves.* 146.—*Wilson* v *Brownsmith*, *do.* 180.—*Lambert* v. *Lambert*, 11 *Ves.* 607.—*Gillaume* v. *Adderley*, 15 *Ves.* 384.—*Mann* v. *Copland*, 2 *Maddock's Rep.* 223.—*Page* v. *Leapingwell*, 18 *Ves.* 463.—*Parrot* v. *Worsfold*, 1 *Jac. & Walk.* 574.—*Smith* v. *Fitzgerald*, 3 *Ves. & Beame*, 5.—*Walton* v. *Walton*, 1 *Johns. C. C.* 258.

John Dawson, Jesse A. Dawson and Martha Dawson,
v.
Sally Dawson, Evelina Alston and George Alston,
} From Halifax.

Defective voluntary conveyances, are not aided by a court of Equity; but those rights which vest under them, are protected.

Where a tenant in common of slaves, voluntarily conveyed all of a particular kind, which might fall to his share upon a division, and then fraudulently contrived that none of that kind should be allotted to him—a division, made with this fraudulent intent, was held to be inconsistent with the rights which the deed vested in the donees.

The case made by the bill was, that *Harry Dawson*, the husband of the Defendant *Sally*, died, leaving a will, by which he bequeathed his negroes to his wife and her sister, the Defendant *Evelina*, as tenants in common—a moiety to each; that letters of administration with the will annexed, issued to the Defendant *George*, a brother of the two legatees. That the Defendant *Sally*, by deed executed the 5th March, 1824, in consideration of the natural love and affection which she had to the Plaintiffs *John* and *Jesse*, brothers of her deceased husband, conveyed to them all the negroes which belonged to her husband before his marriage, which might fall to her upon a division between her sister and herself. The deed reserved to the donor a life-estate in the negroes, and provided that the donees should pay to the Plaintiff *Martha*, one-third of their value. The bill then charged, that the Defendant *George* caused a division of the slaves to be made between the legatees, under an order of the County Court. That at the time of making the division, the commissioners were notified of the interest which the Plaintiffs held under the deed from the defendant *Sally*, and were requested either to make a division by chance, after dividing the negroes into two lots, without any regard to the fact of their being either the property of *Harry Dawson*, or of the Defendant *Sally*, before their

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intermarriage; or by allotting them indiscriminately, first to one of the legatees, then to the other; or to divide them in any fair and equitable manner. But that the Defendant *George*, with an intent to render the deed of the Defendant *Sally* to the Plaintiffs *John* and *Jesse* ineffectual, fraudulently procured the commissioners to allot to the Defendant *Sally*, all those negroes which belonged to her before her marriage, and to the Defendant *Evelina*, all those which, before that time, belonged to the testator, and had delivered the negroes in pursuance of this unjust and fraudulent division. The prayer was, that the division thus made, might be set aside, and the Defendant *George* compelled to divide the negroes again upon just and equitable principles.

A demurrer to the bill was filed by the Defendants, which was on the Spring Circuit of 1827, sustained by his honor Judge RUFFIN, and the bill dismissed. Whereupon the Plaintiffs appealed. At June term, 1827, the cause was argued, by *Gaston* for the Plaintiffs, and by *Badger* for the Defendants.

Gaston, for the Plaintiffs.

1. The property conveyed by the deed, was an incident to property vested in the Defendant *Mrs. Dawson*, and therefore is the subject matter of an executed contract. (*Fonville* v. *Casey*, 1 *Murph.* 389.)

2. But if the contract cannot be deemed as executed, the subject matter of it not being in esse, yet it is a contract executory, and binding upon the covenantee.

3. Whether the contract is executed or executory, as it relates solely to chattels, and is under seal, it requires no consideration for its support, and will be protected from fraudulent combinations. (*Bunn* v. *Winthorp* 1 *Johns. Ch. Rep.* 329, 336.)

If the deed passes an actual interest, we do not come into Court for the purpose of setting it up, but to prevent that interest from being affected by a fraud.

If the deed is only the evidence of an executory contract, we come into Court to have it executed; upon the ground, that by our practice, contracts concerning slaves, though they are chattels, are regarded precisely as contracts concerning plate, family jewels &c. are in England. A specific execution is decreed as to them, because the market value which is all that can be recovered at law, is not a compensation.

4. The contrivance whereby the Defendant gets none of the specified slaves, is manifestly a fraud upon the Plaintiffs. It is inconsistent with their rights on the subject—they had not notice of the division, whereas, if it was the intention to make one fairly, they ought to have been parties to it.

Badger for the Defendants—

To enable a party to obtain relief, there must be, 1st, an interest which the Court considers entitled to its aid. 2d. An injury to that interest.

The present case is similar to cases to compel the specific execution of agreements. It is not the case of a trust or equitable estate, which in this Court, is what a legal estate is at law; for the deed has had its operation at law. The plaintiff comes into this Court to have its effect at law enlarged by a new division, so as to be accordant to what, he says, was the intent of the parties. It is then, in effect, to execute an agreement, and to make that agreement more available at law, than it is as matters now stand.

No agreement will be enforced here without a valuable or a meritorious consideration—the latter of which includes only a case of a father providing for a child, a husband for a wife, &c. and never extends to collaterals. (*Newland on Contracts*, 65—*Ellison* v. *Ellison*, 6 *Ves.* 661.—*Coleman* v. *Sarrel*, 1 *Ves. jun.* 50—3 *Bro. Ch. Rep.* 12 *S. C.*)

In the case of a mere voluntary contract, Equity will do nothing. It will not interfere to prevent a voluntary

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settler from selling so as to defeat the settlement. (*Pulvertoft* v. *Pulvertoft*, 18 *Ves.* 84,98.—*Buckle* v. *Mitchell*, 18 *Ves.* 100, 112.)

The practice of the Court in aiding the defective execution of powers, has some analogy to the present case. Powers defectively executed, are aided in a Court of Equity only in favor of a wife, children, purchasers or creditors, but never for volunteers. (4 *Cruise Dig. ch.* 17) The only exception is, when the remainder man gets the possession of the deeds, and keeps them from the tenant for life, and the latter appoints, but does not pursue the form—the ground of interference then is, that the tenant for life intended to execute, but was prevented by the wrong of the remainder-man, who claims in consequence of that wrong. There is no case showing that the tenant for life is ever controlled. (4 *Cruise, ch.* 17, *s.* 33).

But it is said, that the bill is filed to prevent a fraud from being perpetrated on the Plaintiffs. The use of hard names will not sustain the Plaintiff's case. The bill charges fraud, but shews no right which is entitled to protection. Was the Defendant bound to give any thing? If she had never divided, she could not be quickened. If she is at liberty never to divide, the Plaintiffs cannot complain that their dividend is too small. As the Defendant originally acted without consideration, as it was a mere gift to the Plaintiffs, they cannot complain that they have less than they expected. (*Wallwyn* v. *Coutts*, 3 *Merivale*, 707.)

Gaston, in reply.—It is admitted that Courts of Equity will not compel the specific execution of a contract purely voluntary.

No part of the jurisdiction of Courts of Equity has been watched with more jealousy by Courts of Law, than that of compelling the specific performance of agreements. Their successful assertion of this jurisdiction, in

spite of the struggles of the Law Courts, is attributable principally to the prudent limits within which they have themselves restrained it. They have taken it as a rule to exercise this extraordinary jurisdiction only where it is clearly due in conscience, and Courts of Law cannot give adequate relief. They will not interfere in executing agreements respecting the purchase of personal chattels, as adequate damages may be had at law. They will not compel the specific execution of contracts purely voluntary, but leave them to law, because many of these in law are not even binding, and in the others conscience is satisfied by damages adequate to the disappointment.

If no more appears, a Court of Equity will not compel, as against the maker, the *specific execution* of a *contract*; but if any interest passes, that interest will be supported in Equity against all. Thus in *Coleman* v. *Sarrel*, the deed purported to assign stock to Trustees for strangers, but an actual transfer was not made. The executor of the donor filed a bill to set it aside, and the *cestui que trust* a *cross* bill against the executor to compel a *transfer*. The bill was dismissed—cross bill retained for twelve months, until a suit should be brought at law on the covenant to transfer.

This shows if a recovery should be there effected, Equity would protect the interest of the *cestui que trust*.

Ellison v. *Ellison*, was a settlement in trust, with a power to revoke the trust in a specified form. An instrument was set up as a revocation not pursuing those forms. It was objected that the first settlement was voluntary, but the objection was overruled.

In *Wallwyn* v. *Coutts*, it was decided that Equity will not compel a specific execution against donors, in favor of third persons not *parties to the deed*. It was voluntary, therefore not to be enforced in Equity. Persons not parties to the deed could acquire thereby no interest which was protected.

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In *Pulvertoft* v. *Pulvertoft*, the Court would not grant an injunction to prevent a donor from aliening for value for this would be to overrule *stat. 27th Eliz.* But it will sustain and aid the trust until a sale.

This bill is not filed to compel a *specific execution*—it does not ask the Court to decree that *Mrs. Dawson* should *do any act.* It is a bill against the administrator and to have an act set aside as fraudulent, which has been done *by her and our trustee*, because it is contrary to the executed contract between her and the Plaintiff.

Suppose *Mrs. Dawson* had given her entire equitable interest, either by deed or will—can it be doubted but that the Court would have compelled the trustee, the administrator, to deliver the negroes? (18 *Ves.* 99).

He, the administrator, therefore cannot object to a prayer even for specific execution, and much less to a prayer, to have his fraudulent act set aside.

Suppose after such an assignment, the donor or her executor to *release*, the interest *transferred* would be *protected*, and the release set aside.

Suppose after such an assignment, she should agree to take *money* and no negroes—surely this agreement would be set aside.

Suppose a second assignment purporting to be *for value*—would not a bill lie to have it set aside on an allegation that it was fraudulent. She is made a party, because interested. The bill seeks to set aside a fraudulent and collusive conveyance.

But the fact is, that in our country, as to many purposes, legacies are legal rights. In England they are not noticed at law. But here the case is different. If it is a legal right, it is conveyed at law, and the interest conveyed will be protected, in Equity.

The act done is in violation of the plain intent of the contract.

1st. The words "all that part &c. that may *fall* to me" clearly indicate an *allotment*, in the ordinary sense of the word, and not "such a part as I may *choose* to take."

That is a vicious construction of an agreement which leaves the contractor unbound. By the contract, she was bound to give *all of a particular kind*, and it is contended that she has a right to give only what she pleases. This case is very similar to that of *Jones* v. *Martin*, (*5 Ves. jr.* 266 *note.*)

It is also similar to cases of collusive appointments under a power, which are held to be void, and the estate goes as if the power had not been executed, (*Cocklinton* v. *Bayne*, 1 *Bro. Ch. Rep.* 450—16 *Ves.* 26—1 *Maddox*, 205.)

HENDERSON, Judge.—Voluntary executory agreements receive no aid, either from Courts of Law or of Equity. The parties stand upon their rights, such as they are, and hence it is a maxim, that defective voluntary agreements will not be aided in a Court of Equity; any reformation of a conveyance being an execution of the original agreement, so far as the conveyance is varied. The same motive, which induces a Court to refrain from enforcing an agreement, no part of which is executed, prevents it from enforcing any *part* of it. The want of a consideration is therefore universally a good defence to a bill for rectifying a voluntary conveyance, or enforcing a voluntary agreement.

Where however the conveyance is complete, and property passes, or rights are vested by it, that property, or those rights, are guarded and protected, notwithstanding there was no consideration for passing or raising them.

The question presented by this demurrer, therefore, is does this bill seek other rights than those created by the conveyance, or does it only seek for the security and

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protection of those, which the deed has already given to the Plaintiffs?

The deed transfers to the Plaintiffs, such of the slaves as had belonged to the husband of the donor, and which should be allotted to her upon a division between her sister and herself. This is a gift of slaves *in presenti*, who were to be designated by an act *in futuro*. If upon the division, none of the kind were allotted, nothing passed; if any such were allotted, they did pass. The right to call for this division, did not arise from any promise made by the donor, that she would divide: for then, it is admitted that a consideration would be necessary to support it—but it arose as a necessary incident to the right of property created by the deed. If any thing passed by the deed, it diminished the property of the donor, and destroyed the power of making such a division as she pleased, which, as owner, she possessed before its execution, and imposed upon her the obligation of regarding the interest of the donees. If this is not the case, and she is at liberty to divide as she pleases, the deed might be made by her perfectly ineffectual, as she could at once have assigned to her sister all the slaves which belonged to her husband, and thus entirely defeat the gift. A difference cannot be perceived between such a division and the one complained of; for it is clearly illusory, and defeats the rights of the donees—if not to the same extent, certainly it does in some degree, which, in principle, is as objectionable as the total frustration of the gift. It has been likened to the case, where a man grants all the corn which he may grow, or to use the common phrase, *make*, in a particular field. Although he cannot be enforced to cultivate that field, yet he shall not actively interfere for the purpose of defeating his gift or grant, by wantonly destroying the corn growing there. But this, it is said, would be a wanton act, and one to which self-interest does not prompt, as it does in

the present case. True, but it is as equally inadmissible to pursue our own interest, at the expence of the rights of others, as it is wantonly to destroy those rights. The principle is, that I may, by a rightful act, take care of myself, although I may thereby injure another. All laws, human or divine, allow this; but I cannot do this by a wrongful act. But this, it is said, is begging the question; and it is insisted, that the division complained of, is not a wrongful act. That act however, cannot be rightful, which entirely destroys, and renders of no effect, a gift, or transfer, passing property; which, if permitted to operate in the usual and ordinary way, would produce a probable benefit to the donee; and it is obvious, that the probable effect of the deed would be beneficial, as it required a combination to prevent its ordinary result.

As soon as this gift was made, if the deed was not a perfect nullity, certain rights were created by it in the donees. It is true, they were contingent, as to the particular subject upon which they would attach; but it would be strange to allow the right, and at the same time place it out of the protection of the law.

Such is my view of the case. I have considered the deed as if fairly obtained, and that there has been a fraudulent combination to obstruct its fair and usual operation. But I must observe, that I have had, and still have, difficulty upon it. I am disposed to overrule the demurrer, without prejudice and without costs.

HALL, Judge.—When it is said the deed in question is voluntary—that it was given upon no consideration, it seems difficult to adduce reasons why the Court should proceed in this case, and grant relief. The old beaten ground, long since occupied by the Courts of Equity—*not to aid voluntary conveyances*, seems to render any reasons that might be urged to show that the bill should be dismissed, both trite and unnecessary.

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But fraud in making a division of the negroes is alleged. The deed of gift was certainly given upon a contingency. There was something like a blank to a prize; something like an appeal to the doctrine of chances. If the division of the negroes is set aside for fraud, and there is to be another drawing of the lottery, the managers or commissioners must be instructed, in the next division which they make, in order to protect the interest of the Plaintiffs, or fraud will be again alleged. Indeed, to avoid fraud altogether, an equal division of the negroes ought to be made between *Mrs. Dawson* and her sister. For if we depart from the case, as the parties have made it by the deed, there is no stopping-place between that and allowing the Plaintiff a full share of the negroes in dispute. The parties themselves might have so inserted it in the deed, but we see they have not done so. And by this mode of proceeding, the Plaintiffs will be placed upon much more favorable ground, than they stand on in the deed of gift made to them. They will, in fact, be made to draw a prize, when they have not paid for a ticket.

I cannot hesitate to say, that the bill should be dismissed.

Taylor, Chief-Justice, concurring in opinion with Judge Henderson, it was ordered, that the decree below be reversed, and the Demurrer overruled, without prejudice and without costs.

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Robert Donaldson
v.
The President, Directors & Company of the State Bank, R. Strange, et al. } From Cumberland.

A deed to a copartnership vests the property in the concern, not in the individual members. Each takes an entirety, and, by his own deed, can only convey his right to the residue after a settlement of the copartnership accounts.

Potts vs Blackwell 4 Jo Eq. 59.

A creditor who takes an incumbrance to secure an antecedent debt, without releasing a surety, is not such a purchaser as is protected by want of notice.

A mere creditor, who has not obtained a lien by judgment, has no right to ask the aid of a Court of Equity, to follow the property of his debtor.

When lands conveyed to D. M. & Co. and also to M. in trust for D. M. and Co. were conveyed by M. who died insolvent, indebted to the Company, and without personal representation, to secure his individual debt, *it was held*, upon a bill filed by a creditor of the copartnership, to subject this property—first, that nothing passed by the deed, in the land conveyed to D. M. & Co.

Secondly. That the creditor of M. was not a purchaser for value, within the meaning of the rule which protects them when they are not affected with notice.

Thirdly. That no decree could be made, founded on the fact that M: was a debtor to the copartnership, until his estate was represented.

Fourthly. That the Plaintiff, not having established his demand, and having no lien, had no right to ask a Court of Equity for assistance.

The bill alleged, that *Robert Donaldson, John McMillan* and *James Thorburn*, in the year 1803, entered into copartnership, under the name and style of *Donaldson, McMillan & Company*—that, in the course of their business, they acquired real estate, which was either purchased upon speculation with the partnership funds, or was taken as security for debts due it. That, from accident or mistake, or because the matter was not considered of importance, the assurances for the land thus acquired, were not always made to the copartnership by its name; but were sometimes thus made, at others to

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Robert Donaldson & John McMillan, as tenants in common, and in some instances, either to *Donaldson* or to *McMillan*, in severalty, as the one or the other happened to be the active agent in the purchase and assurance. That the copartnership was dissolved in the year 1808, by the death of *Donaldson*—that at the time of its dissolution, it was insolvent, and was indebted to one *Samuel Donaldson*, of London, in a very large sum. That *McMillan* died in the year 1820, also insolvent, and indebted to the copartnership, and that he had no personal representative. The bill then averred, that the executors of *Samuel Donaldson*, who died in the year 1813, for a valuable consideration, had assigned to the Plaintiff, the debt due their testator by *Donaldson, McMillan & Company*—that *Thorburn*, the surviving partner, who was a Defendant, had admitted this debt to be due, and in part payment thereof, had assigned to the Plaintiff, all the interest which vested in him as surviving partner, in the real estate in question. It was then charged that *McMillan*, before his death, had conveyed the land thus acquired, with the partnership funds, to the Defendant *Strange*, and one *John Winslow*, in trust, to secure the payment of his individual debt due the Defendant, the Bank of Cape Fear; and after discharging that, then, in trust, for other of his creditors—that *Winslow* was dead, and that the land remained in the hands of the Defendant *Strange* unsold. It was insisted, that *McMillan* was a trustee of the lands thus acquired, for the creditors of *Donaldson, McMillan & Company*, and that the Defendants had notice of that trust. The prayer was, that the Defendant *Strange*, might be declared a trustee for the Plaintiff, and be compelled to convey to him all the estate he held under the deed from *McMillan*, and that all other parties having any interest in the land might join in the conveyance.

The heirs of *Donaldson* and of *McMillan*, and also the persons beneficialy interested in the declaration of trust

made in the deed to *Strange* and *Winslow*, were made Defendants, and either filed formal answers or disclaimers. The bill was taken *pro confesso* as to *Thorburn*. The Defendant the Bank of Cape Fear, admitted in its answer, the conveyance of *McMillan* to *Strange* and *Winslow*, and that it was in trust, to secure a debt due it—that some of the property thereby conveyed, was originally assured to *Donaldson McMillan & Company*; but as to the fact that any part of that assured to *McMillan*, was purchased with the funds of the copartnership, they denied any knowledge thereof, and put the Plaintiff to the proof of it—and they insisted, that they were purchasers for value, and without notice. The Defendant *Strange*, in his answer, insisted upon the same facts, claimed no beneficial interest in the property, and submitted to such a decree as should indemnify him.

The cause was argued by *Gaston* and *Hogg*, for the Plaintiff, and by *Badger*, for the Bank of Cape Fear.

HENDERSON, Judge.—This bill is filed by one who claims to be a creditor of the firm of *Donaldson, McMillan & Company*, and also the assignee of *Thorburn*, the surving partner of that firm. Its object is, to reach certain real estates, mortgaged or conveyed in trust by *McMillan*, one of the partners, to secure an individual debt, before that time owing by him, to the Defendant—the Cape Fear Bank. It alleges, and it is admitted in the answers, that some of the land was held by the copartnership under legal titles, vesting the estate in it.—The bill also alleges, that there were other lands, the legal title whereof was in *McMillan*; but that he held them in trust for the firm, having purchased them with the copartnership funds, and for its benefit. The Defendants put the Plaintiff upon proof of this trust, and allege that if there was one, they are purchasers for value, and without notice.

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As to that part of the property, the legal title of which is in the company, the Defendant has not the shadow of a claim, until the debts of the firm are paid. Property thus situated, is entirely unlike an ordinary joint tenancy. The parties have no moieties; the property resides in the *company*, not in the individual copartners. Each has only a contingent right to a part, after the debts are paid, and the copartnership ended; and therefore the transfer of one of the partners only passes that contingent right. The copartnership takes the entirety, to pass any thing but the contingent right, that is to pass the estate, the firm must convey, for that is the owner. It is something like an estate, granted to husband and wife; *they* take by entireties, and not by moieties. If the husband grants one half, or the whole, nothing passes but by estoppel, and if the wife survives him, she takes the whole, notwithstanding the grant of the husband, for she is not bound by his estoppel. If therefore, McMillan is indebted to the firm, to the value of this property, the Defendant can claim nothing, until the debt is satisfied. If the land, the legal title to which vested in McMillan, was not held by him in trust for the copartnership, very clearly the Plaintiff has no right. If it was so held, the Defendant took it, subject to that trust, unless he discharges himself from it. He says that he is a purchaser for value, without notice. From the case, as it appears at present, I am inclined to think, that the Defendant, the Bank, is not a purchaser for value, but a mere incumbrancer. For what value did the Bank pay for the trust? Nothing; it was to secure a debt contracted, before the trust was contemplated. As regards expenditure, the Bank stood after, as it did before the deed. Had the Bank purchased with an antecedent debt, and no matter how old, (I use the word *purchased* in its vulgar sense) the extinguishment of the debt would have been value sufficient. Here the debt remains, as it was before the conveyance. Had the Bank even released endorsers, I presume it would have been sufficient.

But the Court cannot decree for the Plaintiff as a creditor, because he has not obtained a judgment; he cannot pursue the property in the hands of the Bank, without obtaining a lien upon it. He appears as a mere creditor, and nothing is clearer than that a mere creditor cannot pursue his debtor's property in the hands of a third person. Nor can he sustain his claim as assignee to *McMillan's* part of the property, held by the copartnership, without showing that *McMillan* was indebted to it. However strong the evidence of this fact may be, unless the personal representatives of *McMillan* are before the Court, we cannot examine into it. His insolvency and intestacy will not do in a case like this, for upon his indebtedness, depends the Plaintiff's right. Neither is the Defendant prepared for a hearing. It is quite probable, indeed I am almost satisfied of the fact from the uniform practice, that the Bank had indorsers for *McMillan's* debt, who were discharged upon taking the trust, or mortgage. I am unwilling therefore, in a case so important as this, finally to decide it, in its present state; but would recommend, that it be remanded, for the purpose of making amendments, and preparing proofs.

PER CURIAM.—Let the cause be remanded to the Court below, each party paying their own costs in this Court.

☞ Upon the respective rights of the copartnership and of the several copartners, vide the following cases: *Fox* v. *Hanbury, Coup.* 449—*West* v. *Skip*, 2 *Ves.* 239, better reported by the name of *Skip* v. *Harwood*, 2 *Swanston* 586—*Hankey* v. *Garret*, 1 *Ves. jr.* 236—*Field* v. ——— 4 *Ves.* 396—*Eddie* v. *Davidson*, *Doug.* 650—*Campbell* v. *Mullett*, 2 *Swanston* 551—*Sheriff* v. *Wilkes*, 1 *East.* 48—*The King* v. *Rock*, 2 *Price*, 198—*In Re Wait.* 1 *Jac.* & *Walk.* 585—*Moody* v. *Paine*, 2 *John. Ch.* 548—*Nicholl* v. *Vandewater*, 4 *Do.* 522—*Waters* v. *Taylor*, 2 *Ves.* & *Bea.* 299.

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Charlotte Ward, executrix of John D. Ward, v. John Coffield. } From Edgecomb.

A legacy which is equal to or larger in value than a debt due by the testator to the legatee, is *prima facie* a satisfaction of the debt.

Where A devised all his North-Carolina property to his son B, and all his Tennessee property to his son D, a resident of Tennessee, and charged all his debts due in North-Carolina upon the devise to B, a debt due to D less than the legacy to him, was held to be satisfied by it.

This bill was filed to obtain the advice of the Court, and in order to expedite the cause, a case agreed was made up, of which the following are the material facts:

The Plaintiff's testator formerly resided in the State of Tennessee, where he married and had issue *David C. Ward*. On the death of his wife, he removed to this State, leaving his son *David*, and a considerable property in the State of Tennessee, where *David* has ever resided. In this State he again married, and had issue *Joseph E. Ward*, and died considerably indebted here, and to his son *David* two hundred and fifty dollars, which was the only debt he owed out of this State. By his will he devised all his North-Carolina property to his son *Joseph*, and all that in Tennessee to *David*, and authorised his executors to sell such of his property *in this State* as they might deem necessary and sufficient for the payment of his "*just debts in this State.*"

The question made by the case was, whether the debt due *David* was a proper charge upon the North-Carolina estate, or not.

Gaston, for the Plaintiff, submitted the case without argument, no Counsel appearing for the Defendant.

TAYLOR, Chief-Justice.—*John D. Ward* was indebted to his son *David* in the principal sum of two hundred and fifty dollars, and devised to him all his property in

Tennessee, which consisting of real and personal estate together, is of much greater value than the debt so owing from the testator to his son. In order to ascertain whether the legacy shall be construed a satisfaction of the debt, the general rule to govern us is, that a legacy which is greater, or as great as the debt, shall be taken as a satisfaction; and this rule is firmly established, notwithstanding the late cases which decide, that where there are circumstances, or presumptions, that the testator did not intend it as a satisfaction, the Court will lean against the rule. Where these circumstances do not exist, the rule will clearly operate, although it has never been a favorite with the Courts; it being thought strange that if the estate is sufficient for both debt and bounty, the testator should not intend both. There is no circumstance in this case, to repel the application of the rule; but there is on the contrary a clause in the will, from which an inference arises, that the testator was aware of the rule, and meant that it should operate. He makes a provision for the payment of his debts in this State, and none for the only debt he owed out of the State, viz: that to his son, from the belief, probably, that he was paying that debt by the legacy. If therefore, the rule were not applied to this case, it must be disregarded in every other; but this a Court has no authority to do—independently of the evils which would arise from a want of certainty in the law. I am consequently of opinion, that the debt of the testator to his son *David*, is not a charge, either in whole or in part, upon the property in this State.

PER CURIAM.—Decree that the legacy to *David C. Ward* is a satisfaction of the debt due him.

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Robert Pike
v.
Starkey Armstead & Thomas Turner.
} From Washington.

A subsequent mortgagee, whose deed is duly registered, is bound by a prior unregistered one, of which he had notice.

If a mortgagee, for the purpose of keeping up the mortgagor's credit, suffers his deed to remain unregistered, it seems not to be fraudulent *per se*, but its character depends upon the intent. It is not fraudulent as to one who knows the whole transaction.

The papers in this cause were very voluminous; an abstract of the whole of them is unnecessary, as it is thought that the following statement is sufficient to place the points decided by the Court, before the profession. The Plaintiff alleged, that at the request of one *Joel Thorp*, he lent him 700 dollars, to secure which he took a mortgage at six months upon sundry negroes. That *Thorp* urged the Plaintiff to keep the mortgage secret, and not to have it registered within the six months for which the loan was made, as he would certainly repay it within that time—and as its publicity would injure his credit, and cause his creditors to press him immediately. That the Plaintiff, believing *Thorp* to be solvent, as he was in possession of a large visible property, and confiding in his promise of payment, had not procured the mortgage deed to be registered. That the Defendants had direct notice of its existence, being conusant of the whole transaction; notwithstanding which, they had procured a deed of trust for their benefit from *Thorp*, in which the negroes mortgaged to the Plaintiff were included. That they had caused this deed to be registered before that to the Plaintiff, and had brought an action at law against the Plaintiff for the negroes mortgaged to him, which he had taken into his possession soon after the expiration of the six months for which the loan was made. The prayer of the bill was for an injunction, and

satisfaction to the Plaintiff's mortgage from the property conveyed to secure the Defendants.

The Defendants, in their answers, admitted express notice of the Plaintiff's mortgage—they denied that *Thorp* was generally esteemed to be solvent at the time he gave the mortgage to the Plaintiff, but alleged that he was then, and before that time, had been greatly discredited, and that many executions were hanging over him; that the Defendants fearing they might sustain a loss by him, had made up an estimate of his debts and effects, the result of which being unfavorable, the Defendant *Turner* had waited upon him and communicated it to him, and had asked for and obtained a conveyance for their security. They insisted that the Plaintiff had fraudulently concealed his mortgage, with the view of giving *Thorp* a false credit, and enabling him to delay his creditors in the collection of their debts, and that they had obtained a fair priority over the Plaintiff, which they submitted they were justified in holding.

The cause was heard upon bill and answer, by his honor Judge NASH, on the Spring Circuit of 1826, who dissolved an injunction previously obtained, and dismissed the bill—from which decree the Plaintiff appealed.

The cause was shortly argued in this Court, by *Badger*, for the Plaintiff, and *Gaston & Hogg*, for the Defendants.

TAYLOR, Chief-Justice. From the facts and admissions in this case, my opinion is, that the Complainant is entitled to relief. The first question arises on the act of 1715, (*Rev. ch.* 7) relative to mortgages. A mortgage between the parties is valid, although no registration be made, as well from the words of the act, as the uniform construction of it. Its professed design was to prevent frauds by double mortgages, which design is accomplished by giving priority to a subsequent mortgage, if registered before a prior one, unless the latter be regis-

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tered within fifty days; so that a person about to secure a debt, or to loan money, may by inspecting the register's books, ascertain whether there be a prior incumbrance upon the property, and if there be none, or none registered within fifty days, he may proceed to act, without fear of secret liens of which he knows nothing. The law was designed to give notice to persons so situated; but if it be clearly established in proof, that a subsequent mortgagee had notice of a prior mortgage, although not registered, he shall in Equity be bound by it, although he had obtained a priority at law; for having this notice, he may protect himself from harm by forbearing to proceed. The words of the English Registry act are stronger than those of the act of 1715, viz: "and that every such deed or conveyance, that shall at any time after, &c. be made and executed, shall be adjudged fraudulent, and void against any subsequent purchaser or mortgagee for a valuable consideration, unless such memorial thereof be registered, &c." According to the preamble of that act, it was intended to secure subsequent purchasers, *against prior secret conveyances*, and fraudulent incumbrances, corresponding in this respect to the act of 1715. The British act received a construction soon after its passage, which has continued since, without any diversity of opinion; that where a person had no notice of a prior conveyance, there the registering of the subsequent conveyance shall make or prevail against the prior one; but if he had notice of the prior one, then it was not a secret conveyance, by which he could possibly be prejudiced. By this construction, the deed is made void against the subsequent purchaser or mortgagee, whereby they gain the legal estate, but they are still left open to any Equity, which a prior purchaser or incumbrancer may have against them. That the Defendants had notice, before taking the deed of trust, is distinctly admitted; and the remaining question is, whether the purpose for which the mortgage to *Pike* was omitted to

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be registered, is such a fraud, as to deprive him of his equitable right. It appears to me that the suspicion of fraud, is repelled by the ignorance both of *Thorp* and *Pike*, that the former was insolvent: he was in possession of considerable property, which appears to have been thought by the parties equal to the payment of his debts; his eyes do not appear to have been opened to his true situation, until *Turner* waited upon him, after having made an estimate of his debts and his property. Being engaged in trade, it was of importance that his creditors should not come upon him all at once, which they probably would have done, when they saw he was making liens on his property. Whereas the maintenance of his credit for a while might have enabled him to pay all his debts. It seems to me to be a rigorous construction to impute fraud to the omission of an act, which the law did not require; but if it were so, it is void against those only whom it was intended to deceive. It was impossible that the Defendants could be injured, since they were apprised of the transaction. I therefore think that this act for the prevention of fraud, would have the effect of promoting it, if the consciences of the Defendants could not be affected by the notice; for the object of the registry being to give notice, the necessity of it is superseded, as to those who have notice without.

HALL, Judge.—The object of the law in requiring the registration of deeds of trust and mortgage, is to prevent fraud, by giving notice of such deeds to subsequent purchasers and mortgagees, but when they have notice of them in any other way, the object of the law is answered as much as if they were registered; and they have no equitable ground to complain for the want of registration. This is a plain principle of Equity, long acted upon, and easily understood. The authorities on the subject are collected together by *Sugden* in his treatise on the law of vendors, (2 *American, from the 5th London edition*, 511 *n.*)

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To apply this principle to the present case, it will follow, that the Defendants having notice of the Plaintiff's lien, have no Equity to avail themselves of its want of registration. I therefore think that the decree below should be reversed.

PER CURIAM.—Let the decree below be reversed, and decree for the Plaintiff, with costs both at Law and in Equity.

☞ The Reporter, in making the following extract from a late Work of high reputation, does not wish to be understood as impeaching the decision of the Court in the above case; his sole object is to render the Work it is his duty to superintend, both useful and agreeable to the profession.

"Upon the enrolment act of *Hen. VII*, and the docketing and registering statutes, Equity has introduced, under the name of *notice*, a totally different construction, which has been nearly subversive of these descriptions of acts, and has raised a complicated system, much more grievous than any of the individual hardships meant to be redressed.

"They have determined, on the one hand, that a person buying an estate, *with notice*, of a prior incumbrance, *not registered*, shall, in equity, be bound by it, although he has duly registered his own conveyance. On the other hand, they have held, that a person having the legal estate as mortgagee, and advancing more money, *without notice*, of a second mortgage *duly registered*, shall hold, in respect of it, against the second mortgagee. In the former case, an unregistered deed is preferred to a registered one. In the latter, registration, even coupled with priority of time, is of no avail. It is indeed, urged, that the first mortgagee possesses that fiction termed the legal estate, and that both mortgagees are in *pari delicto*.—But, (passing the technical advantage,) if there be blame in the want of search, the second mortgagee affects only himself by it, whereas the first mortgagee affects also the second. In analogy to the foregoing resolutions, it is held in equity, that, although a judgment be not docketed, yet if a purchaser have notice of it before he completes, he shall be bound by it. He already possesses, it is said, that information which the statute intended to furnish him; but to this it might be replied, that he also knows an undocketed judgment is rendered void against himself, and that the judgment creditor might not have intended to rely upon the land contracted for. *Humphrey's on Real Property*, (1 *London Ed.* 154, 155.")

"I shall close with observing, that Courts of Equity have not thought "fit to urge their doctrines upon notice, in opposition to decisions at "law, that voluntary conveyances, are void under the statute of 27 "*Eliz.* to prevent fraudulent conveyances, against subsequent purcha- "sers *even with notice*, although the argument, that what the purcha- "ser knew could never be a fraud upon him, is equally strong here as "upon the registry and docketing acts. Neither have they interfered "with the two successive acts for memorializing life annuities sold for "money. Whatever may be the policy of these different acts, it does not "appear that either the justice or the simplicity of the decisions upon "them would have been improved by the introduction of the equitable doc- "trine of notice. *Ibid.* 160, 161."

Azel Sharpe
v.
Thomas Bagwell. } From Iredell.

Where the payee of a promissory note mutilated it, by cutting off the name of the attesting witness, *it was held* that he was entitled to no relief in a Court of Equity,

The Plaintiff in his bill alleged that the Defendant was indebted to him in a sum of money, secured by two notes, which were attested by two witnesses; that from ignorance that the act would affect the validity of the notes, he cut off the name of one of the subscribing witness; that he had brought an action at law on the notes, in which he had failed, in consequence of this alteration; that nothing had ever been paid by the Defendant on account of the debt secured by the notes, but that the whole thereof was still due. The prayer of the bill was for payment of the debt due the Plaintiff by the Defendant.

The Defendant in his answer, admitted the execution of the notes as charged in the bill, but averred that they were given upon an usurious consideration, which he could only prove by the witness whose name had been cut from them. He insisted that the Plaintiff had mutilated the notes with the view of depriving him of this

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testimony, and prayed all the benefit of the legal defence arising either from the usurious nature of the contract, or from the mutilation set forth in the bill.

A replication to the answer was filed, and proofs taken, but they are not necessary to the elucidation of the case.

The cause was submitted by *Wilson*, for the Defendant, no Counsel appearing for the Plaintiff.

TAYLOR, Chief-Justice.—It is of great consequence to society, that written contracts should be preserved free from every circumstance of suspicion. The old cases have laid down with much precision, the law relative to deeds, that *any* alteration by the obligee will avoid the deed, as well as any alteration by a stranger in a material part; and modern cases have extended the rule to bills of exchange and promissory notes, in which it is still more applicable, from the number of hands through which they may pass. If the alteration might be made with impunity, with the chance of gaining if successful, and not losing in the event of detection, it is probable such attempts would be frequently made, and nothing is more likely to check them, than its being understood, that by tampering with a written instrument the creditor loses his debt. Courts of Equity have, from an early period, acted on the principle of presuming every thing *in odium spoliatoris*. In the time of *Lord Ellesmere*, a decree was made against a Defendant for an estate, upon the ground that he was vehemently suspected of having suppressed a deed, *Lord Hansdon* v. *Lady Arundell*, (*Hob.* 109) and many cases have since occurred in Chancery, and decided on the same ground.—(*Sanson* v. *Nunnery*, 2 *Vern.* 561—*Hampden* v. *Hampden*, 1 *Bro. P. C.* 250—*Dalton* v. *Coatsworth*, 1 *P. W.* 751.)

The alteration of this note was in a most material point, tearing off the name of that witness by whom alone the consideration of the contract could be proved. If

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after a spoliation of this kind, Equity would relieve the creditor, it would encourage others in like circumstances, to repeat the experiment.

I remember a case, tried when I was at the bar, the ultimate decision of which in the Superior Court, was believed to be entirely correct. The suit was instituted in the County Court, against executors on the bond of their testator. Between him and the Plaintiffs there had been other dealings by open accounts, and some payments made, which though directed to be applied to the credit of the bond, were credited to the open account.—The subscribing witness to the bond had been called on to witness this direction, and the Defendant's Attorney having pleaded *non est factum*, required the presence of the witness. But after the case was put to the Jury, the Plaintiff's Attorney tore off the name of the witness, and the Court allowed him to prove the obligor's hand-writing. Upon appeal to the Superior Court, it was ruled without hesitation, that the mutilation had destroyed the bond. The obligee afterwards made an unsuccessful attempt to recover the money in Equity. I think the bill should be dismissed with costs.

Hall, Judge—The Complainant states, that he had no bad motive in view, when he cut off the paper from the instrument on which the witness's name was written. This may be true; but as it is difficult to fathom men's motives, particularly when contradicted by their acts, and as others may hereafter say their intentions were equally pure, when they acted from the most selfish ones, and as a general rule of conduct must be laid down for all, therefore, the law will not permit a man to explain his motive when he does an act in which he is so much interested as the Plaintiff was in the present case. But it judges of his motive from the act done. By cutting off the name of the witness, the instrument might have been

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In the matter o f James Dozier's heirs.

proved by the other witness, without running any risk of bringing to light the usurious consideration, on which the note is charged to have been given.

I have no hesitation in saying the bill should be dismissed with all costs.

PER CURIAM.—Let the bill be dismissed with costs.

In the matter of James Dozier's heirs, upon the petition of James P. Hughs & wife, } From Currituck.

Where land is sold for the purpose of partition, the share of a feme covert in the proceeds, is considered as realty, and cannot be paid to her husband, except she directs it upon a private examination.

From the petition and exhibits, it appeared that the lands of *James Dozier* had been ordered by the Court of Equity for the county of Currituck, to be sold for the purpose of partition; that one *Dennis Dozier*, the husband of one of the persons entitled to the proceeds, had purchased them, and that, upon the confirmation of the sale, the Master was directed to credit his bond, given to secure the purchase-money, with the amount of his wife's share thereof. The petition then stated, that *Dennis Dozier* had died, and that the petitioner, *James P. Hughs*, had intermarried with his widow, and it prayed that the share of the wife might be paid to the present husband.

No Counsel appeard in this Court.

HALL Judge.—No doubt the money coming to the wife of *Hughs*, is to be considered as land. But her present husband has no better title to it than her first had. To entitle him, it is indispensable that she should be privately examined, touching her assent that he should have it; or that she be examined in some way such as

the Court shall direct, equally solemn as that prescribed upon a conveyance of her real property. When this is done, I see no objection to granting the prayer of the petition.

PER CURIAM.—Let the cause be remanded at the cost of the Petitioner.

James Allen
v.
The Buncombe Turnpike Company } From Buncombe.

Where the Legislature authorised one to open a road and collect tolls on it, a subsequent authority for a similar purpose to another, is valid, although it may diminish the profits of the first road.

The case made by the bill was, that the Legislature in the year 1801, granted to *Job Bernard* and *Philip Hoodenpile*, the right of opening a turnpike from the house of *William Hunter*, in Buncombe county, to the Tennessee line, and authorised them to erect gates on the road, and collect toll from persons travelling on it. That the grantees at great labor and expense, had opened the road as they were thus authorised, and had rendered it passable to travellers. The bill then set forth a partition of the road between *Hoodenpile* and *Bernard*, and a conveyance of the eastern half thereof to the Plaintiff. That the Legislature, by an act passed in the year 1819, had recognised the property of the Plaintiff in the road, and in consideration of the great expense which he had incurred upon it, had extended the term during which he was authorised to collect tolls thereon, until the year 1831. The Plaintiff alleged, that he had faithfully performed his duty to the public, by keeping his road in repair, and that he had done nothing to forfeit his franchise. But that the Legislature, in the year 1824, had incorporated several individuals, by the name and style

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of "The Buncombe Turnpike Company" (the Defendant) and had authorized them to survey and "open a road from the Saluda Gap by the way of Smith's, Murrayville, Asheville and the Warm Springs, to the Tennessee line." That the route thus pointed out, within which the franchise of the defendant was to be exercised, interfered with that of the Plaintiff, and that the grant to the latter being the oldest, the Legislature did not intend to affect it by the grant to the Defendant. That the Buncombe Turnpike Company had recently surveyed and laid out a road, upon the route they were authorised by the act incorporating them, to open—which after following the road of the Plaintiff, left it about three miles from its commencement at *Hunter's*, and then diverged from it in such a manner, as greatly to injure the Plaintiff in the profits of his franchise, by enabling travellers to pass round his toll gates. The Plaintiff prayed that the Defendant might be enjoined from using any part of his road, and from entering thereon with the view of opening a road, which would divert travellers from his gates.

A full answer was filed, but as the case was decided upon the allegations of the bill alone, it is unnecessary to give an outline of it, or of the mass of documents filed as exhibits.

The cause was heard upon bill and answer, by his honor Judge Norwood, who dissolved an injunction previously granted, and dismissed the bill without costs, from which decree, the Plaintiff appealed.

Gaston, for the Plaintiff, contended, that the acts complained of were plainly injurious to the Plaintiff, and that his appropriate remedy was by injunction. He insisted that the plaintiff being in possession of a franchise, it could not be taken from him even for the convenience of the public, without giving him an equivalent. For this he cited (*Croton Turnpike Company* v. *Ryder*, 1 *Johns.*

Ch. Rep. 611—*Ogden* v. *Gibbons*, 4 *Do.* 150—*Newburg Turnpike Company* v. *Miller*, 5 *Do.* 101.)

Wilson & Badger, contra, admitted that the Legislature, after granting a franchise, could not retract that grant, and give the same individual franchise to another. But they insisted that the Legislature had a perfect right to grant another franchise of the same kind, if the public convenience required it, of which they were the only judges. They contended, that the cases cited had no application, being cases in which mere private individuals, without a grant from the sovereign, had undertaken to do acts inconsistent with rights granted by that sovereign.

HALL, Judge.—The Plaintiff does not charge in his bill, that the Defendants are about to divest him of a right, acquired under the act of assembly, to his turnpike road, or that the act of incorporation authorises them to do so; but that, in all probability, the travelling custom will withdraw from his road, and a preference be given to that opened by the Company; and that his road is to be travelled over about three miles, before that of the Defendant's commences.

With respect to the last objection, it may be answered, that the Defendants by passing over his road, do not divest his right; he can charge them, or any other persons, who travel it *pro rata*, for that distance, as well as a full price for using the whole of it.

As to the first objection, that the profits of his road will be diminished by the location of the Buncombe Turnpike Road in his neighborhood, it may be answered, that it is the province of the Legislature, to establish roads wherever they think the population and convenience of the country require it; and that private interest and individual convenience, must yield to the public good. It is not to be presumed on slight grounds, that the Legis-

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lature would incorporate a company to open a road for the purpose of oppressing an individual, or for any other object, except that of advancing the convenience of the community. Neither had the plaintiff a right to expect, when the grant was made to him, that no other of a similar kind would ever be made to any other person, in the same section of the State.

Improvement is the result of experience and observation, and the Legislature, collected from all parts of the State, have a constitutional right to avail themselves of these means of knowledge. They have done so in the present case, and their *will* must be the law by which it is to be governed. If the profits alone of the Plaintiff are to be consulted, probably they would be lessened, if another road was opened any where within a day's ride of his. Surely this cannot be the rule, by which the case is to be decided. It is unnecessary to descend to the particular circumstances of this case, as set forth in the bill, answer and exhibits. I think the general principles advanced, sufficient to decide that the bill should be dismissed.

PER CURIAM.—Affirm the decree below, except as to the costs, and decree that the Plaintiff pay the costs below, and in this Court.

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Kezanah Picket and others
v.
Susannah Johns and others, } From Rutherford.

Same Defendants as Plaintiffs
v.
Same Plaintiffs as Defendants.

Upon a bill filed in this State, to execute a decree made in South Carolina, *it was held*, TAYLOR Chief-Justice *dissentiente*, that the Courts of this State have a right to examine into the merits of the decree as upon a bill of review.

Where a resident of South-Carolina, upon separating from his wife, gave her a *post mortem* bond for her own benefit, and that of their children, and died in South-Carolina, having voluntarily conveyed land in this State to illegitimate children, *it was held*, TAYLOR Justice dissenting, that a decree of the Chancery of South-Carolina, declaring this conveyance to be void against the wife and children, was a nullity, the subject matter being without its jurisdiction. Whether the land conveyed to the illegitimate children is liable to be taken for the satisfaction of the bond, Quere?

In such a case, it seems that subsequent advancements, made by the father to the children provided for by the bond, are considered as a satisfaction of it *pro tanto*, and it is clear, that land charged with the payment of his debts is to be exhausted, before a Court of Equity will subject property conveyed, or bequeathed to the illegitimate children.

The bill was filed by *Kezanah Picket* and her trustees. The Plaintiffs alledged, that one *Micajah Picket*, the husband of the Plaintiff *Kezanah*, after the marriage between them had subsisted for many years, and after a number of children had been born to them, commenced an adulterous intercourse with the Defendant *Susannah*, which extended so far, that in the year 1800, he separated himself entirely from his wife and family, and withdrew his support and protection from them.—That upon this event, *Micajah* agreed with the Plaintiff *Kezanah*, upon condition that she would not molest him with lawsuits, and would during his life, relinquish all claim to a support out of his estate, at his death, to cause

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a sum of money equal in value, to the property he took with him at the time of the separation, to be paid her for her own use, and that of several of their children. That in pursuance of this agreement, the Plaintiff *Kezanah*, on the 12th of December, 1800, executed to her husband *Micajah*, a bond with sureties, in the penalty of $6,000, conditioned not to molest him with lawsuits, or to claim a support from his property during his life. At the same time, both *Kezanah* and *Micajah* executed a conveyance, whereby certain slaves and other property, were settled upon six of their children, and on the 10th of January, 1805, *Micajah* having ascertained the value of the property he carried off with him, executed to the Plaintiff *Kezanah*, his bond in the penalty of $30,000, conditioned to be void upon the payment to her after his death, of the sum of $9,850, with interest, which sum of $9,850, was to be divided between the Plaintiff *Kezanah* and three of her children, not provided for by the deed of December 12th, 1800, in certain specified proportions. The Plaintiff *Kezanah* averred, that she had strictly complied with the conditions upon which this bond was executed, and had not molested her husband with lawsuits, or claimed a support from his property; but that her husband had used every stratagem in his power to deprive her of the benefit of this settlement, and particularly, that he had conveyed to one *James McKinney*, who was a Defendant, and who had married an illegitimate daughter of *Micajah* by the Defendant *Susannah*, a large proportion of his property, consisting of slaves and of a tract of land in Rutherford county, upon a pretended sale, but in fact upon a secret trust, to hold it with its increase, and accumulations, for the benefit of the Defendant *Susannah*, and her children by *Micajah*. That *Micajah Picket*, died in the year 1822, having by will, devised the whole of his estate, except some small legacies to his children, by the Plaintiff *Kezanah*, to the defendant *Susannah* and her illegitimate children, and appointed *McKinney* and

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one *Hiram Whitehead*, his executors. It was then averred in the bill, that the testator *Micajah* died at his usual residence in the State of South-Carolina, which was also the domicile of the Plaintiffs, and one of the executors and most of the legatees, and where the greater part of his property was situate; that the Plaintiffs had filed their bill in the Court of Chancery of that State, against the executors and legatees, who were all personally served with process and contested the suit; that upon the hearing of the cause, the Court decreed that the bond delivered on the 10th of January, 1805, by *Micajah Picket* to the Plaintiff *Kezanah*, was in Equity binding upon volunteers—and that the settlement made on the 12th of December, 1800, by *Micajah & Kezanah Picket* of slaves and other property upon six of their children, was valid, so far as respected volunteers claiming under *Micajah*. That the deeds made by the testator *Micajah* to *McKinney*, of slaves and land in the county of Rutherford, were fraudulent, and void against the claim of the Plaintiffs; and also that the Plaintiffs should have satisfaction to the amount due upon the bond delivered to the Plaintiff *Kezanah* by the testator, out of the property of which he died possessed, and out of that conveyed to *McKinney*, so far as the same was within the reach of the process of the Court. It was then charged, that a large sum remained due upon that decree, after exhausting the property of the testator within the jurisdiction of the Courts of South-Carolina; that the present Defendants, who were the executors and legatees of *Micajah Picket*, with a view of evading that decree, had removed some of the personal property to this State. The Plaintiffs prayed a discovery and account of all the property which the Defendants had received from *Micajah Picket*, and that they might have execution against the same, or any other property of the testator with in this State, to satisfy the balance due upon the decree of the Court of Equity for the State of South-Carolina.

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The Defendants, who were the executors and legatees of *Micajah Picket*, in their answer, admitted most of the material facts set forth in the bill. They contended, however, that the decree which the Plaintiffs had obtained in South-Carolina, had been satisfied either from sales made of the testator's property in South-Carolina, or by advancements made to the children of *Kezanah*, who were entitled to a part thereof, by the testator, either in his lifetime or by his will—they insisted that the bonds and deeds executed by the testator and the Plaintiff *Kezanah*, and set forth in the bill, were intended for the adjustment of family disputes, and should be considered as a family settlement; they therefore insisted that all advancements made by the testator, either by will or otherwise, to any of his children by the Plaintiff *Kezanah*, should be considered as a satisfaction *pro tanto* thereof, and as equivalent for the property settled upon his children, by the deed of December 12th, 1800.

The Defendant *McKinney*, admitted the conveyance to him, by the testator, of a tract of land in Rutherford county, and of certain slaves; he contended that he was a purchaser for value, as in consideration of the conveyance he had agreed to attend to the estate for the term of ten years, working thereon himself, together with the negroes conveyed to him, and one of his own, to keep an account of the profits of the plantation, and at the end of the term, to convey five-sevenths of the original value, together with its increase and accumulation, to five children of the testator by the Defendant *Susannah*. The other Defendants, who were the children of *Susannah*, some of whom were infants, insisted that they were creditors to the value of their labour, and claimed the possession of their legacies until they were severally satisfied the amount thereof.

The will of *Micajah Picket*, and a copy of the record of the suit in South-Carolina, were filed as exhibits. By the first, it appeared that he devised property of differ-

ent kinds to the Plaintiffs, who were his children, and charged his debts upon his lands in the county of Buncombe. The contents of the latter have been anticipated in giving a statement of the bill and answers. It appeared however, that several of the Defendants were infants, and answered by their guardian; but no day was given them upon their full age to show cause against the decree.

The cross bill prayed a discovery and an account of the advancements, made by *Micajah Picket* to any of his children.

Replications were taken and proofs filed; they principally related to the amount of the advancements, which the Defendants insisted should be brought into account.

Gaston & Badger, for the Plaintiffs in the original bill, contended,

That the decree made in South-Carolina, was conclusive upon this count—that proceedings in Courts of Equity were as fully embraced by the constitutional provision and the act of Congress upon that subject, as those of a court of Law. (*Mills* v. *Duryee*, 7 *Cranch* 481. *Hampton* v. *McConnell*, 3 *Wheaton* 234).

That, independently of the constitutional provision, upon principles of national comity, it is presumed to be correct, until plainly impeached.

It does not appear judicially to the Court what is the law administered in South-Carolina; but admitting it to be that of the English Chancery, the decree is correct. Chancery does not aid pure volunteers; but it enables those whose rights are founded upon what is termed a meritorious consideration, to assert them. Conveyances made without a valuable consideration, to a wife or children, are enforced in England, against those which are purely voluntary. (*Coleman* v. *Sarel*, 3 *Bro. Ch. Rep.* 12. 1 *Ves. jr.* 50. *Taylor* v. *Jones*, 2 *Atk.* 600, *Ambler* 468).

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But here, there is a consideration of actual value moving from the wife, which is sufficient even at law, to support a promise to her children, viz. the abandonment of all right to a support at the hands of her husband.

Wilson, for the Defendants, contended strenuously, that the lands in Rutherford, were not liable to satisfy the decree, and he insisted that this Court was not bound to enforce the decree, made in South-Carolina, unless they were satisfied with the principles upon which it was founded. It can have no greater obligation here, than it has in the Courts of South-Carolina, and there it can be reversed, either upon a bill of review, or a petition for a rehearing. He contended, that the whole matter, as it regarded the land in this State, was *coram non judice*, and void. Besides, the decree was plainly erroneous, as it was pronounced against infants, and they had no day given them to show cause against it. But it was also incorrect in the law which it administered, if we take it for granted, that the Courts of Equity in South-Carolina, are governed by the rules of the English Chancery. In England, when both parties have the same merits, Equity does not interfere between them, but leaves them to assert their rights at law. Thus where both the parties are purchasers, the equity being equal, the law must decide. So also, when both are volunteers, he who has the legal title must prevail. (1 *Fonblanque* 335 *to* 350). Executed voluntary agreements, prevail against those which are executory. (*Bunn* v. *Winthrop*, 1 *Johns. Ch. Rep.* 329).

The bond given to the Plaintiff in this case was purely voluntary, if not as to the mother, surely it was so as to the children. But a bond given to the mother of an illegitimate child, is supported in Equity; and where property is given to an illegitimate child, who is in possession, no instance can be found where it has ever been taken away, except for an actual creditor. (*Bunn*

v. *Winthrop*. *Annandale* v. *Harris*, 2 *P. W.* 432, *Ryder* v. *Kidder*, 10 *Ves.* 360).

Here, then, there are two sets of volunteers, with a moral obligation on the part of both, on him under whom they claim, the one with a legal title, and in possession; the other with a mere executory agreement. Under these circumstances, the law must prevail.

HALL, Judge.—I am willing to give to this decree all the obligatory force, which is attached to it in South-Carolina; and there, it is binding upon the parties, while it remains in force; but it is not unalterable; I suppose it may be reversed there, in whole or in part, by bill of review, either for error in law, or for matter of fact, properly brought before the Court. It cannot be more obligatory here than it is there. If it could be reversed there, and the cause of reversal is apparent to this Court, where the execution is prayed for, that cause of reversal may be examined, as if it was reheard upon a bill of review. This Court has no other way of coming at it; however I give no opinion on this part of the case, because I concur in the principles, upon which the decree is based. I think the contract between *Micajah Picket & Kezanah* his wife, in the year 1805, was founded on a good, and meritorious consideration. That in point of obligation, it is more than equal to settlements, made after marriage; because in this case a compensation for the injury he had done her, the continuation of which was contemplated for the rest of his life, viz. in withdrawing his protection from her, and withholding from her any thing like a suitable support, formed a consideration in addition to that upon which such settlements are supported. The settlement upon the children was also founded on a meritorious consideration, and the more to be enhanced, as it announced that a father's care was about to be withdrawn from them also.

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The decree in part has been executed in South-Carolina, and it remains to be executed in this State; and the Plaintiffs are entitled to a decree for that purpose. But what property shall be liable to to that decree, is made a question. It is admitted, that the Buncombe lands are liable, as well as other property which belonged to the testator, undisposed of at his death.

I think it equitable, that any donations made by *Picket* to the Plaintiffs, after the date of the contract, should be brought into the account.

It is contended, that the lands in Rutherfordton are not liable. These lands were conveyed in the year 1817, to the illegitimate children of *Micajah Picket*, but not upon a valuable consideration. The conveyance was voluntary, and I am inclined to think they are liable. It is held, in *Taylor* v. *Jones* (2 *Atkyns* 600) that a settlement on a wife and children after marriage, is a valuable consideration as to the husband, and even against a a voluntary conveyance. If a voluntary conveyance is made, and there is a defect in it, so that it cannot operate at law, equity will not decree an execution of it; but if it is intended as a provision for younger children, the rule is different. (*Allen* v. *Arme*, 1 *Vent.* 365. *Coleman* v. *Sarel*, 1 *Ves. j'r.* 54—*Ibid.* 3 *Bro.* 14—*Cases in Equity ab.* 24—*Bacon's Abr. Agreement. B.* 2).

From these authorities, it would seem that the lands in Rutherford are liable to the Complainants' demand. But if the Defendants have enhanced their value by labour, that additional value should be brought into the account. On these different points, a reference should be made to the Master.

HENDERSON, Judge.—I mean not at present, to express an opinion upon the conclusiveness of the decree of the Court of South-Carolina, upon matters within its jurisdiction; but I am inclined to believe, that it stands before us as upon a bill of review, liable to be reversed

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for error in law apparent upon its face, or to be impugned by facts since discovered. Greater sanctity cannot be claimed for it here, than is given it in the State where it is made, and there, I presume it may be reviewed, and reversed for errror. And if it cannot be resisted here, when attempted to be enforced by bill, our Courts would be open to enforce the decrees of other States, and shut to an examination of their errors; for we cannot bring them before us by bill of review. This is in accordance with the Constitution of the United States, and the act of Congress; it is giving the decree the same faith and credit here, that it has in the State where it was made. (*Baker & Child*, 2 *Vern.* 227. *West* v *Skip*, 1 *Ves. sen.* 245.) But whatever may be the effect of the decree, or judgment of a Court, either of our own or another State, upon a matter within its jurisdiction, it is clear, that upon a matter without it, the decree of judgment is a nullity every where; for all the faith attached to them, arises from the fact, that the Court is authorised and appointed *by law* to act upon the subject.

I think, that part of this decree was given upon a matter within the jurisdiction of the Court, and part upon a matter without it. It was competent to the Court to set up the contract between *Picket* and his wife, to order its payment by the executor and legatees of *Picket*, out of the assets of the estate, wherever situated, and to remove every obstruction to the process of the Court, issued for the satisfaction of the decree. These Defendants, as legatees of *Picket*, are affected by the decree and it is evidence against them, so far as they claim any thing under the will. But as donees, or grantees of the Rutherford lands, I think that the decree affects them not; for with great respect and deference for the distinguished gentleman who pronounced it, I think the Court had no jurisdiction. For although it is admitted, that the Court, having the power to make a decree, has, as incidental thereto, the power of making that decree

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effectual, and may, by virtue of that incidental power, remove every obstruction to the process of the Court, in carrying it into execution; yet this incidental power can be carried no higher than the source from which it arises—the right to enforce the decree. If therefore, the obstruction did not, in fact, impede the process of the Court, the Court had no right to interfere with it, or pass upon it. It is the fact of obstruction, which gives rise to the power of removal. In this case, the obstruction arose from the locality of the lands, and not from the claim of the Defendants. Therefore, all that was said or done, in regard to the Defendant's title, and every thing else in relation to them, as donees or grantees of these lands, is a perfect nullity. But to expedite the business, the Clerk and Master will take an account of all payments, advancements or donations, made by *Picket* to the Complainants, or either of them, since the deeds of 1805. He will also take an account of the value of the labor and services of the Defendants, the illegitimate children, which came to the use of *Picket*, deducting the expenses of rearing them; for as they are deprived of the charities of children, they are entitled to the rights of strangers. He will also take an account of the consideration paid, or given upon the deed of 1816, and report to the next Court. The Sheriff of Buncombe will sell the Buncombe lands, upon the premises, upon a credit of one, two or three years, giving forty-one days notice at the Court-house, and five other public places, and report to our next Court.

TAYLOR, C. J. *dissentiente*...If the assistance of this Court were sought to effectuate a decree of a foreign Court of Chancery, the merits of it would be open to examination, and we should be convinced of its justice and propriety, before we proceeded. Like a foreign judgment at law, it would be but *prima facie* evidence of the justice of the demand. But when the Constitution of the United States

has declared, that "full faith and credit shall be given in each State, to the public acts, records and judicial proceedings of every other State; and the Congress may by general laws, prescribe the manner in which such acts, records and proceedings, shall be proved, and the effect thereof." And further, where by the act of 1790, ch. 11, Congress did provide for the mode of authenticating the records and judicial proceedings of the State Courts, and then declared that the "records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every Court within the United States, as they have by law or usage in the Courts of the State, from whence the said records are, or shall be taken." I do not see how, in point of effect, a final decree can be distinguished from a judgment at law, for the term "judicial proceedings" includes both; and if this decree would in South-Carolina be deemed conclusive on the rights of the parties, it must be so here, so far as the Court of Chancery in South-Carolina had jurisdiction. It has been said by an eminent Judge, that as to foreign sentences or judgments, there "is only one way in which they are examinable, and that is where the party who claims the benefit of it, applies to our Court to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent, to which it would be obligatory perhaps in the country in which it was pronounced, nor as obligatory to the extent which by our law sentences and judgments are obligatory, not as conclusive but as a matter *in pais*, as a consideration *prima facie* to raise a promise, we examine it as we do all other considerations of promises, and for that purpose, we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law. In all other cases, we give entire faith and credit to the sentences of foreign Courts, and consider them as conclusive upon us." (*Ld. Eyre, C. J. in Philips* v. *Hunter*, 2 *H. Bl.* 410.)

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In considering the effect of a judgment or decree, pronounced in another State, and duly authenticated here, it appears to me that the only question open for discussion is, whether the Court had jurisdiction of the cause and the parties. So far as the Court pronouncing them had jurisdiction, they are entitled in this Court to "full faith and credit;" the jurisdiction of the Court only, and not the merits of the judgment or decree are enquirable into.

The Defendants were made parties to the suit in Chancery in South-Carolina, and so far as their rights were decided upon in that decree, I hold it to be of the same conclusive character, as if pronounced by a Chancery Court in this State; and that we are not permitted, under the Constitution, and the act of Congress giving effect to it, to pronounce a different decree upon any of the rights of the parties then brought into contestation. That the infant Defendants were not allowed a day, after their attaining full age, to show cause against the decree, may be, and I think is, a cause for reversing it upon a review in South-Carolina; but when the decree comes before us unreversed, we cannot, on account of that objection, withhold from it faith and credit, any more than in an action of debt upon a judgment in another State, we could refuse to sanction it, because there were errors on the face, unconnected with the Court's jurisdiction. Though the decree of the Court of South-Carolina could only operate *in personam*, as to the land lying in this State, yet now that this Court is called upon to carry that decree into effect, they ought to do so, to the extent of jurisdiction possessed by the South-Carolina Court. After a minute examination of all the cases on this subject, the result is thus expressed by the Supreme Court of the United States; that in a case of fraud of trust or of contract, the jurisdiction of a Court of Chancery is sustainable wherever the person be found, although lands

not within the jurisdiction of that Court may be affected by the decree. (*Massie* v. *Watts*, 6 *Cranch* 160.) This is a case of the description and character, on which that Court had a right to pronounce an opinion; but my brothers do not view the subject in this light, and therefore the reference must be entered up, as they have directed.

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